Supreme Court, U.S.
FILED
JAN 13 1992
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(2)

No. 91-1015

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

SHARON TEMKIN, *et al.*,
Petitioners,

v.

FREDERICK COUNTY COMMISSIONERS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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January 13, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. Can the allegedly negligent operation of a motor vehicle form the basis for a substantive due process deprivation under 42 U.S.C. § 1983, simply because the driver is a deputy sheriff acting under color of state law?

2. Did the United States Court of Appeals for the Fourth Circuit properly find that a Deputy Sheriff's high speed chase of a criminal did not shock the conscience when the criminal refused to stop his vehicle and reacted to the officer's siren and lights by accelerating to a high speed?

3. Did the United States District Court for the District of Maryland abuse its discretion, and did the United States Court of Appeals for the Fourth Circuit improperly affirm this abuse, when the District Court granted the Defendants' Motion for Summary Judgment, when the Plaintiffs noted their desire to take further depositions, even though the proffered results of these depositions had nothing to do with Deputy Selby's actions or liability?

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STATEMENT OF THE CASE

At approximately 10:00 p.m. on July 14, 1987, Deputy Selby of the Frederick County Sheriff's Department observed a car spinning its wheels as it left the Frederick County Texaco station on Route 85 at a high rate of speed. Deputy Selby turned on his lights and sirens and gave chase. Immediately, the pursued car began to drive at a high rate of speed southbound on Maryland Route 355.

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[1] The facts set forth below are taken in the light most favorable to the Petitioners, as required by Rule 56 of the Federal Rules of Civil Procedure.

During the chase, Deputy Selby repeatedly contacted the County dispatch office by radio. He advised dispatch of his location and described the vehicle he was chasing. He repeatedly updated dispatch as to his location. Eventually, he was able to report the tag and a better description of the vehicle. He could hear the dispatcher trying to get additional cars to assist Deputy Selby. Deputy Selby made four of five calls to the dispatch office during this pursuit. During the course of the chase, the attendant at the Texaco station called 911 to report that approximately $17.00 worth of gasoline had been stolen. Information was relayed to Selby over his radio that the vehicle was wanted in a robbery at the Texaco.

During the high speed pursuit, Mr. King's vehicle continuously straddled the double yellow line in the center of Route 355, forcing numerous vehicles traveling in both directions off the road. During the course of the pursuit, upon observing the manner in which Mr. King drove his vehicle, Deputy Selby felt obligated to continue to follow King using his lights and sirens, so that Selby would provide an early warning detection for oncoming vehicles.

Both vehicles continued along Maryland Route 355 at speeds ranging from 65 mph to 105 mph. Contrary to Petitioner's statement on page 3 of the Petition for Writ of Certiorari, the cars traversed a generally rural area and not a highly populated area. At some point, the pursued vehicle (operated by Mr. King) lost control, crossed over the double yellow line, and struck the car driven by Sharon Temkin. As a result, Ms. Temkin's car was pushed to the eastern curb, bounced and spun back toward the center of the roadway, and specifically toward the lane of travel occupied by Selby. Selby immediately "stood on the brakes" in an attempt to stop. This caused Selby's vehicle to slide to the left. A collision occurred on the double yellow line, with Selby's vehicle striking Temkin's vehicle in the driver's side of Temkin's vehicle.

On page 5 of the Petition, the Petitioners state that "just prior to the collision, Selby was traveling between 75 and 80 mph." However, Petitioners neglect to inform this Court that this speed was sustained by Selby sometime before he hit his brakes. The Plaintiffs' expert placed Selby's impact speed at 41 to 54 mph.

At the time of the accident, Sheriff's Department General Order #204 covered the Frederick County Sheriff's Department with respect to pursuits. This order required the "on-duty supervisor" to monitor all pursuits, and granted this supervisor the authority to halt any pursuit if this was warranted. At the time the chase began, the on-duty supervisor (Corporal Eyeler) was responding to a potential break-in at another location. He could not monitor the pursuit because his radio did not work well from that distance. As soon as Corporal Eyeler heard of the chase, he drove in the direction of the chase. However, he did not obtain radio contact with Deputy Selby prior to the accident. Contrary to the statement on page 5 of the Petition for Writ of Certiorari, after the collision, Deputy Selby attended Mrs. Temkin. He did not ignore her, nor did he apprehend Mr. King.

On page 22 of the Petition, Petitioners claim that the County Commissioners abdicated their responsibility to train Deputy Selby. However, the Petitioners fail to note that Deputy Selby was certified by the Police Training Commission of the Department of Public Safety and Correctional Services of the State of Maryland. A portion of the training program involves instruction on the proper procedures for conducting police chases. All Frederick County deputies are required to have this certification. Deputy Selby also received general police training, including training in police chase procedures from the Metropolitan Training Academy in the District of Columbia.

In addition, the Sheriff's Department adopted General Order #204, which was in effect at the time of this chase.

Plaintiff's expert Geoffrey Alpert, Ph.D., testified that General Order #204 met the standards published by organizations such as the International Association of Chiefs of Police. The Order met the appropriate standards of the field as they existed in 1987.

Prior to the filing of this action, the Petitioners have field a tort suit in the Circuit Court of Frederick County, Maryland. That case has been held in abeyance pending resolution of this appeal.

REASONS FOR DENYING THE WRIT

This Court has clearly stated that negligence cannot form the basis for a substantive due process violation under 42 U.S.C. § 1983. In various situations, the Circuit Courts of Appeal have applied different labels to determine what type of conduct would support a substantive due process violation claim by police officers or sheriffs. Some Circuits have required a showing of gross negligence and outrageous conduct. Other Circuits have required a showing of deliberate indifference or recklessness for Section 1983 substantive due process claims. In this case, the Fourth Circuit stated that the conduct must "shock the conscience" to be actionable. A close analysis of the standards applied by the various Circuits shows (1) the standards are much closer that the labels might initially seem, and (2) even under the most minimal standard of gross negligence, Deputy Selby was entitled to Summary Judgment as a matter of law. Therefore, if the Court wishes to resolve any perceived inconsistencies among the Circuit Courts, the Court should wait for a case involving conduct which meets one standard but not another. The conduct alleged in this case meets none of the standards applied by any Circuit Court.

I. INTRODUCTION.

In *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976), this Court stated that if the respondent's view there would prevail (which it did not),

> "It would be difficult to see why the survivors of an innocent bystander . . . negligently killed by a Sheriff driving a government vehicle, would not have claims equally cognizable under Section 1983. It is hard to perceive any logical stopping place to such a line of reasoning." (424 U.S. at 698, 96 S.Ct. at 1159).

Although this Court declined to start down this line of reasoning suggested by the Respondent in *Paul v. Davis*, *supra*, the Petitioners seek to have this Court entertain exactly the claim which it has often rejected. In *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986) and *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), this Court repeatedly held that the Defendants' alleged lack of reasonable care (negligence) could not form the basis for a constitutional violation. In *Daniels*, this Court noted that the state of mind required for a violation of Section 1983 varied according to the circumstances. The Court stated "not only does the word 'deprive' in the Due Process Clause connote more than a negligent act, but we should not 'open' the Federal Courts to lawsuits where there has been no affirmative abuse of power." 474 U.S. at 330, 88 L.Ed.2d at 667. The Court specifically refused to "make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." 474 U.S. at 332, 88 L.Ed.2d at 669 (quoting *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)).

In the Petition for Writ of Certiorari, the Petitioners seek to apply due process standards developed in custodial situations (such as prisons, jails, schools) to automobile liability. The Petitioners seek to apply the same standards to Deputy Selby's relationship to Ms. Temkin as the Courts would apply to a prison guard's relationship to a prisoner. By virtue of a prisoner's custody, the prisoner is in a special relationship with the custodial authorities and dependent upon them for protection. *Colburn v.*

Upper Darby Township, 830 F.2d 663 (3rd Cir. 1988). (See discussion at pages 9a-10a of the Petition).

The Petitioners cite the different labels used by the various Circuits to describe the standard of conduct required to form a due process violation under the Fourteenth Amendment (pages 10-12 of the Petition). The labels vary from "gross negligence," "recklessness," and "deliberate indifference," to "shocking to the conscience." While the labels may be different, the actual standards are much closer than Petitioners admit. The inconsistencies between the Circuits are minor at best. Most importantly, even those Circuits which have accepted gross negligence as a basis for a constitutional deprivation (the least onerous standard) have consistently rejected the notion that high speed pursuit by police officers constitutes an act of gross negligence for purposes of 42 U.S.C. § 1983 liability. Even if this Court were to adopt the lowest standard of any Circuit (gross negligence), the Respondents would still be entitled to Summary Judgment as a matter of law under that standard. If this Court wishes to unify the Circuits on the appropriate standard, this case does not present an opportunity to do so.

II. STANDARD OF REVIEW.

The United States District Court for the District of Maryland granted Summary Judgment to the Defendants/Respondents. The United States Court of Appeals for the Fourth Circuit reviewed the District Court's grant of Summary Judgment *de novo*, employing the same standards applied by the District Court. Both Courts were satisfied that no genuine issue of material fact existed and that the Defendants/Respondents were entitled to Judgment as a matter of law. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322 (1986). The Defendants/Respondents bore the initial burden of pointing to the absence of a genuine issue of material fact. The burden then shifted to the Plaintiffs/Petitioners to come forward

with facts sufficient to create a trialable issue of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The same standard of review applies to this Court. *Anderson v. Liberty Lobby, supra.* Unsupported speculation is not sufficient to defeat a Motion for Summary Judgment. The non-moving party must do more than simply allege a dispute as to a material fact. The non-moving party must show that if such a disputed fact is resolved in its favor, sufficient evidence would exist for a Jury to return a verdict in its favor. *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126 (4th Cir. 1987); see *Celotex Corporation v. Catrett*, 477 U.S. 317 (1986), *Anderson v. Liberty Lobby, Inc., supra.*

III. THE FOURTH CIRCUIT'S DECISION TO APPLY THE "SHOCKS THE CONSCIENCE" STANDARD RAISES NO NEW ISSUES.

This Court has consistently rejected negligence as a basis for Section 1983 liability under the Due Process Clause of the Fourteenth Amendment. In *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), this Court held that conduct characterized as "mere negligence" could not form the basis for Section 1983 liability. This Court clarified this issue in *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon*, 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986). In *Daniels, supra*, this Court stated "we conclude that the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty or property." 474 U.S. at 328 (Court's emphasis). This Court expressly left open the question whether something less than intentional conduct (such as recklessness or gross negligence) would trigger the protection of the Due Process Clause.

The Petitioners have a State tort law remedy available. Indeed, the Temkins have already filed a tort action

in Maryland State Court. This Court has ruled, that under certain circumstances, a Petitioner may pursue a claim for deprivation of substantive due process, even if an adequate State law remedy is available. However, this Court has set certain restrictions on substantive due process claims under such circumstances. In *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205 (1952), this Court noted that conduct which may form the basis for Section 1983 liability, due process, even if a State law remedy is available. The Fourth Circuit applied this standard in *Hall v. Tawney*, 621 F.2d 607 (4th Cir. 1980), when it described conduct which "amounts to a brutal and inhumane abuse of official power literally shocking to the conscience." In short, the Fourth Circuit's decision to apply a "shock the conscience" standard is consistent with this Court's past decisions, as well as the Fourth Circuit's past decisions. There is nothing new or shocking about this standard.

The Petitioners point out that other Circuits use different "buzzwords" or labels to describe the type of conduct which may form the basis for Section 183 liability. Some Circuits have described this conduct as "gross negligence," while others have used the term "recklessness," and still others have used the term "deliberate indifference." However, *none* of the Circuits would allow the Petitioners to pursue a Section 1983 claim based on the actions of Deputy Selby. The Circuits have consistently refused to turn motor vehicle negligence into a constitutional violation.

If this Court perceives a meaningful conflict between the Circuits, this case does not present the opportunity to resolve that conflict, because the facts in this case fail to meet any of the standards applied by the Circuits as a matter of law.

A. Although the Circuits Use Different Labels to Describe the Requisite Conduct for a Constitutional Violation, the Standards are Actually Very Similar and the Conflicts Between the Circuits are Minimal.

1. *Recklessness or Deliberate Indifference Has Not Been Used to Assess Automobile Negligence Liability under 42 U.S.C. § 1983.*

In the Petition, Petitioners allege that the "shock the conscience" standard is out of step with the rest of the Circuits. The Petitioners claim that every Circuit has recognized "that a claim of recklessness or deliberate indifference constitutes a violation of substantive due process." (Petition, page 12). In footnote number 5, Petitioners cite numerous cases for the proposition that recklessness or deliberate indifference may give rise to a violation of the Due Process Clause of the Fourteenth Amendment and 42 U.S.C. § 1983. However, *none* of these cases arise simply from reckless driving which allegedly caused an accident.

In *Estelle v. Gamble*, 429 U.S. 97, S.Ct. 285, 50 L.Ed. 2d 251 (1976), the Plaintiff was a prisoner who had been denied medical care. This Court held that, under the Eighth Amendment (cruel and unusual punishment analysis) and under the Fourteenth Amendment (due process analysis), a Plaintiff must show deliberate indifference to serious medical needs to make out a constitutional claim. Naturally, the Federal Courts have followed this Court's decision in *Estelle* in analyzing due process claims made by prisoners, patients, school children and other persons under the custody and control of those who act under color of state law. However, there is simply no reason to apply this standard to automobile negligence liability.

2. *The Standards Applied by the Circuits are Very Similar.*

The Petitioners point to different labels used by various Federal Courts to support their argument that the Cir-

cuits are in conflict as to the type of conduct required to support a claim for due process violation. When this Court looks past the labels and "buzzwords," the Court will find that the Federal Courts are applying very similar standards. While the standards may not be identical, it is often difficult to see any difference between one Court's version of "gross negligence," and another Court's version "recklessness."

In *Community of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988), the District of Columbia Circuit blended several standards. Citing *Daniels v. Williams, supra*, the Circuit Court noted that substantive due process prevents governmental power from being used for purposes of oppression. Quoting *Shillingford v. Holmes*, 634 F.2d 263, 265 (5th Cir. 1981), the Court stated that substantive due process prevents abuse of government power that shocks the conscience. Finally, the Court noted that substantive due process prevents action which is "legally irrational because it is not keyed to any legitimate State interest." (859 F.2d 943-44). None of these standards contradicts any other.

The District of Columbia Circuit noted the difficulty in distinguishing recklessness from gross negligence. The Court described recklessness by saying that "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that the harm would follow." 859 F.2d at 948, quoting W. Prosser and W. Keeton, *Prosser and Keeton on Torts* Section 34 at 213 (5th ed. 1984). The Court further stated that not all reckless acts may constitute due process violations. To determine whether the "constitutional line has been crossed," a Court must consider numerous factors, such as the need for the action, the relationship between the need and the type of action taken and whether the action was taken in good faith or maliciously and sadistically for the very purpose of causing harm. (859 F.2d at 949).

In *Nishiyama v. Dickson County, Tennessee*, 814 F.2d 277 (6th Cir. 1987), the 6th Circuit adopted a "gross negligence" standard. The Court admitted that "gross negligence" evades easy definition. The Court went on to say "in our view, a person may be said to act in such a way as to trigger a Section 1983 claim if he intentionally does something unreasonable with disregard to a known risk or a risk so obvious that he must be assumed to have been aware of it, and of a magnitude such that it is highly probable that harm will follow." (814 F.2d at 282). At the same time the Court adopted a "gross negligence" standard, the Court described the action in question as "reckless indifference to the risk." (814 F.2d at 283).

The Petitioners point to the Sixth Circuit to support their contention that the Circuits are split as to whether gross negligence may form the basis for a substantive due process deprivation. However, the definition of "gross negligence" is identical with the D.C. Circuit's definition of "recklessness," and the Fourth Circuit's definition of "shocking to the conscience." Although the labels are different, the standards are the same, *Britt v. Little Rock Police Department*, 721 F.Supp. 189 (E.D.Ark. 1989); *Reed v. Allegan County*, 688 F.Supp. 1239 (W.D.Mich. 1988). See also discussion in *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (deliberate indifference to victim's well being also constitutes gross negligence); *Torres Ramirez v. Bermudez Garcia*, 898 F.2d 224 (1st Cir. 1990) (recklessness or callous indifference is required).

3. *Because Mrs. Temkin Was Never in Custody, the Standards Cited by the Petitioners Do Not Apply.*

Persons who are in State custody or under the State's control are clearly subject to abuse of the Government's significant power over them. Members of the public however, are not held in State custody. The State does not exert the same measure of control over them. The re-

lationship is fundamentally different, and there is no reason for the same standard to apply. *Colburn v. Upper Darby Township*, 838 F.2d 663 (3rd Cir. 1988); *Washington v. District of Columbia*, 802 F.2d 1478 (D.C. Cir. 1986).

On pages 16-17 of the Petition, Petitioner claims that the Fourth Circuit's decision is absurd. According to the Petitioner, it is absurd for the Constitution to offer greater protection to prisoners than to innocent motorists. This allegation ignores the special relationship between a State and those persons whom it controls or places in custody. The Due Process Clause was designed to prevent abuse of governmental power, or employing that governmental power as an instrument of oppression. *Davidson v. Cannon*, 474 U.S. 344, 348, 106 S.Ct. 668, 88 L.Ed.2d 677, 682 (1986) (citing *Daniels v. Williams*, *supra*). Far from being absurd, the Fourth Circuit's position makes perfect sense. The police owe a different constitutional duty to those persons who are placed in custody and who are under the government's control, because this relationship is exactly that which implicates the Due Process Clause.

B. Under the Standards Applied by Any Circuit Court of Appeals, the Respondents Were Entitled to Summary Judgment.

The Petitioners correctly note that several Circuits have applied different labels to the conduct which may form the basis for a due process violation under the Fourteenth Amendment and Section 1983. In the context of police driving, no Court has *ever* based due process Section 1983 liability solely on high speed driving which resulted in an accident.

In *Walton v. Salter*, 547 F.2d 824 (5th Cir. 1976), a pedestrian was killed by a police car responding to the call for an armed robbery in progress. The Plaintiff's allegation of "willful and wanton disregard for the safety of others" failed to state a basis for due process Section

1983 liability. High speed driving under such circumstances does not strike such a claim.

The Sixth Circuit has decided two cases in which Plaintiffs sought to impose due process Section 1983 liability for high speed chases. In *Galas v. McKee*, 801 F.2d 200 (6th Cir. 1986), the officer chased a speeder, who later crashed. The Sixth Circuit concluded "that the use of high-speed pursuits by police officers is not an unreasonable method of seizing traffic violators." (801 F.2d at 203). In *Jones v. Sherill*, 827 F.2d 1102 (6th Cir. 1987), the police pursued at traffic offender who had been furloughed that day from the local jail. The high speed chase ended when the offender's vehicle crashed into the Plaintiff's vehicle, killing the Plaintiff. The Circuit Court held that high speed pursuit of a traffic offender does not rise to the level of "gross negligence and outrageous conduct" necessary to sustain a Section 1983 claim. While the Sixth Circuit said that "gross negligence" would sustain such a claim, the Court was quite concerned that "gross negligence is something more than simple negligence with the addition of a vituperative epithet . . . (citations omitted). . . . The facts alleged in support of the legal conclusion of gross negligence must be sufficient to charge the government officials without outrageous conduct or arbitrary use of government power. The high speed pursuit alleged in Jones' complaint is not sufficient to state a claim. . . ." (827 F.2d at 1106).

The Eighth Circuit confronted the same question in *Roach v. City of Frederickstown, Mo.*, 882 F.2d 294 (8th Cir. 1989). In *Roach*, the high speed pursuit ended when both the pursued vehicle and the officer's vehicle crashed into a bystander's vehicle. The Plaintiffs argued that the officer's driving "shocked the conscience." Without deciding exactly what standard did apply, the Eighth Circuit held that neither negligence nor gross negligence would state a claim under Section 1983. The Court further held that the officer's conduct does not rise to the

level of gross negligence, and therefore certainly did not rise to the level necessary to sustain a Section 1983 claim.

The Eleventh Circuit confronted this issue in *Cannon v. Taylor*, 782 F.2d 947 (11th Cir. 1986). In *Cannon*, a motorist was killed by a police officer who was speeding without using his lights or sirens. The Eleventh Circuit held that "a person injured in an automobile accident caused by the negligent, or even grossly negligent, operation of a motor vehicle by a policeman acting in the line of duty has no Section 1983 cause of action for violation of a federal right. The type of negligence alleged in this case may well be actionable under State law. Automobile negligence actions are grist for the State law mill. But they do not rise to the level of a constitutional deprivation." (782 F.2d at 950).

In each of these cases, the Circuit Courts have refused to find a deprivation of substantive due process under 42 U.S.C. § 1983 because of an automobile accident. In *every* case in which a Circuit Court has considered the question, that Court has refused to rest Section 1983 liability on high speed driving.[2] Therefore, there is no conflict among the Circuits regarding high speed pursuits. This case does not provide an opportunity to examine the appropriate standard, because under *any* of the standards the Respondents are entitled to Summary Judgment.

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[2] In *Reed v. Allegan County*, 688 F. Supp. 1239 (W.D. Mich. 1988), the police pursued the Plaintiff (who was not suspected of any crime or traffic offense) at high speed. The police then set up a roadblock where they knew he could not stop, concealed the roadblock and then blinded him with overhead lights as he approached the roadblock. The U.S. District Court held that such conduct (which borders on summary execution) could support a due process deprivation claim. This case did not state that pursuit could form such a basis.

IV. THE FREDERICK COUNTY COMMISSIONERS WERE PROPERLY GRANTED SUMMARY JUDGMENT UNDER WELL-SETTLED PRINCIPLES OF LAW.

In 1989, this Court decided *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197 (1989). To establish municipal liability on this basis, Ms. Temkin had to allege and prove that the Frederick County Commissioners adopted a policy of not training their Deputies for high speed pursuits. However, all of the evidence contradicts such a claim. All police officers in the State of Maryland, prior to their employment by the Frederick County Sheriff's Department, are required to be certified by the police training commission of the Department of Public Safety and Correctional Services (Annotated Code of Maryland, Article 41, Section 4-201(d)(6) (1986) Supp. 1989). A portion of this training program includes construction on the proper procedures in conducting police chases. All Frederick County Deputy Sheriffs are required to complete this training. In addition, the Frederick County Sheriff's Department adopted General Order # 204 governing police chases. Deputies were required to be familiar with all general orders, and to follow all such general orders. The Plaintiffs' expert (Dr. Geoffrey P. Alpert) testified that General Order # 204 was within the standards put out by organizations such as the International Association of Chiefs of Police. Dr. Alpert conceded that the order minimally complied with the published standards in 1987. Deputy Selby testified that he was familiar with General Order # 204.

The Petitioners allege that the Frederick County Commissioners never trained the Sheriffs. However, this ignores the fact that the State of Maryland trains all of these officers. Petitioners also ignore the fact that the Frederick County Sheriff's Department required such certification. Petitioners further ignore the fact that "Roll Call" training covered questions as to training.

In addition, a claim of inadequate training against the Frederick County Commissioners cannot stand without a finding of a constitutional violation by Deputy Selby. *Belcher v. Oliver*, 898 F.2d 32, 36 (4th Cir. 1990). Because Deputy Selby has no liability under Section 1983, neither do the Commissioners. The Petitioners have raised no suggestion that this principal of law should be changed.

V. PUBLIC POLICY DOES NOT REQUIRE THIS COURT TO HAMPER LAW ENFORCEMENT.

On page 22 of the Petition, Petitioners allege that high speed police chases is a nationally recognized problem and has been widely discussed in the media. The Petitioners ignore the fact that crime is also a "nationally recognized problem and has been widely discussed in the media." The Federal Courts have unanimously refused to hamper the police by assigning civil liability under Section 1983 for high speed pursuits. Despite having a remedy under tort law, the Petitioners seek to assess civil rights liability.

In *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 1705, 85 L.Ed.2d 1 (1985), this Court stated that Courts are hesitant to declare a police practice of longstanding 'unreasonable' if doing so would severely hamper effective law enforcement." Balancing the government's legitimate interest in apprehending criminals, against the risks to the public, to the officer and to the criminal is a very difficult task. Moreover, successful apprehension of criminals encourages them to avoid such high speed chases. If this Court were to restrict a police officer's ability to chase criminals, the Court would encourage such criminals to flee.

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DECIDING THE SUMMARY JUDGMENT MOTIONS WITHOUT PROVIDING FOR ADDITIONAL DISCOVERY.

Prior to Judge Nickerson deciding the Motions for Summary Judgment, the Plaintiffs submitted an Affidavit of counsel, stating that they wished to take additional depositions. According to the Affidavit, the depositions would establish that the County owned the police vehicle (although this was already admitted in Answers to Interrogatories), that the Frederick County Commissioners had no policy regarding pursuits, and would establish facts relating to the relationship between the Commissioners and the Sheriff's Department. A second deposition would establish the absence of training by the Sheriff's Department in the procedures under General Order number 204.

Since Deputy Selby was trained by the State of Maryland (not the County or Sheriff's Department), consistent with law enforcement custom and procedure in the State of Maryland, and since Deputy Selby testified that he was aware of General Order number 204, none of these "facts" were material. None of these "facts" dealt with Selby's liability. Petitioners offer no pressing reason why the law in this area should be changed. The Affidavit cited facts which were immaterial, and Judge Nickerson exercised his discretion when he declined to wait for Plaintiff's additional and untimely requested discovery. There is certainly no conflict among the Circuits or among the States on this question.

CONCLUSION

For all of the foregoing reasons, this Court should decline to issue a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. The Circuit Courts have unanimously rejected attempts to turn motor vehicle torts into constitutional violations. Even though the Circuits have used slightly different labels in analyzing the question, the Circuits have unanimously held that high speed pursuit driving by police officers cannot form the basis for a substantive due process violation under 42 U.S.C. Section 1983.

Respectfully submitted,

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January 13, 1992

APPENDIX

APPENDIX

ANNOTATED CODE OF MARYLAND, ARTICLE 41 SECTION 4-201(d)(6) (1986)

(d) AUTHORITY, RESPONSIBILITY AND DUTIES IN RELATION IN TRAINING SCHOOLS.—Subject to the authority of the Secretary of Public Safety and Correctional Services, the Commission is vested with the following authority, responsibility and duty:

(6) To certify persons as police officers who have:

(i) Satisfactorily met the Commission's standards; or

(ii) Provided the Commission with sufficient evidence that he or she has satisfactorily completed a training program in another state of equal quality and content as required by the Commission.

FEDERAL RULES OF CIVIL PROCEDURE, RULE 59 (NEW TRIALS; AMENDMENTS OF JUDGMENTS)

Rule 59. New Trials; Amendments of Judgments

(a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) TIME FOR SERVING AFFIDAVITS. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) ON INITIATIVE OF COURT. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the

motion. In either case, the court shall specify in the order the grounds therefor.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.